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No. 64

IN THE

Supreme Court of the United States

OCTOBER TERM, 1957

NATIONAL LABOR RELATIONS BOARD, *Petitioner*

v.

DISTRICT 50, UNITED MINE WORKERS OF AMERICA, and BOWMAN TRANSPORTATION, INC., *Respondents*

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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BRIEF OF DISTRICT 50, UNITED MINE WORKERS OF AMERICA, RESPONDENT

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BRIEF OF DISTRICT 50, UNITED MINE WORKERS OF AMERICA, RESPONDENT

STATUTE INVOLVED

The pertinent sections of the Labor Management Relations Act of 1947, as amended, (61 Stat. 136, 29 U.S.C. 151, et seq) are reprinted in this Appendix, infra, pp. 30-36.

STATEMENT OF THE CASE

The National Labor Relations Board, under complaints based on charges by the Teamsters' Union,[1]

[1] International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, AFL, Local No. 612.

held that Bowman Transportation, Inc. had been guilty of an unfair labor practice with reference to the Teamsters' Union in November, 1953 and that Bowman Transportation, Inc. had unlawfully supported and assisted District 50, United Mine Workers of America, in May, 1954 in violation of Section 8 (a) (2) and Section 8 (a) (1) of the Labor Management Relations Act of 1947, as amended.

District 50 not being a party to the proceedings entered the case under Section 10 (d) by filing an application to modify the Board's order. This application (R. 40-41) asked the Board to modify the order by deleting and striking therefrom paragraphs 1 (c) and 1 (d) and paragraph 2 (c).

Paragraph 1 (c) ordered Bowman Transportation, Inc. to cease and desist giving effect to the collective bargaining agreement made with District 50 on May 22, 1954. Paragraph 1 (d) ordered the employer to cease and desist from recognizing District 50 as the representative of its employees and paragraph 2 (c) ordered the employer to withdraw and withhold all recognition from District 50 as representative of its employees, both paragraphs to be effective "unless and until the said labor organization shall have been certified as such representative by the Board".

The application informed the Board that District 50, United Mine Workers of America, had not complied with the provisions of Section 9 of the Labor Management Relations Act of 1947, as amended (a fact which the Board presumably already knew). In support of the application, District 50 submitted eleven (11) different grounds (R. 42-43):

By stipulation filed in the court below on November 29, 1955, all parties agreed upon the questions presented (R. 1-2) and by an amendment to the stipulation filed December 12, 1955, upon which the court entered an order December 13, 1955 (R. 69-70), question c. of the original stipulation was stricken. The only questions left in the case so far as District 50 was concerned were questions a. (3) and b.

"a. Whether substantial evidence on the record as a whole supports the findings of the Board that Bowman Transportation, Inc.—

* * * * *

(3) Violated Section 8 (a) (2) and (1) of the Act by assisting or contributing support to District 50.

b. Whether the Order of the Board directing Bowman Transportation, Inc. to withhold recognition from District 50 unless and until that organization is certified by the Board as representative of Bowman's employees, is a proper and lawful order."

The court below held, "that Bowman had engaged in the unfair labor practices found by the Board clearly appears from the evidence" and that the order was appropriate except with respect to paragraphs 1 (d) and 2 (c) containing the phrase, "unless and until the said labor organization shall have been certified as such representative by the Board". (R. 52)

The court states the question and its holding thereon in this language:

"* * * District 50's attack on these portions of the order raises the question whether the Labor Board has authority to forbid an employer to recognize or contract with a labor organization chosen by its em-

ployees as their exclusive bargaining representative so long as the union remains uncertified as such.

"We hold the Board does not have such authority.* * *" (R. 52-53).

The court below adopted as applicable to the instant case the language of Chief Judge Parker of the Fourth Circuit (R. 53-54) and held paragraphs 1 (d) and 2 (c) were improper and should not be enforced in their present form since they precluded District 50 from representing the employees in the future, "even though hereafter they should choose it in an atmosphere and a situation entirely free from the influence of unfair labor practices. There should be added, at the end of each of those paragraphs, the words 'or shall have been freely chosen as such by a majority of the employees after all effects of unfair labor practices have been eliminated'". As thus amended, the order of the Board was enforced.

The court also suggested a form of notice to be posted by Bowman Transportation, Inc. and deleted therefrom the reference to the Teamsters' Union so that the notice should not indicate that the Board preferred the Teamsters (R. 55).

Wilbur K. Miller, Circuit Judge, wrote the opinion in which Circuit Judge Prettyman joined. Circuit Judge Washington wrote a dissenting opinion which closely followed the supplemental decision and order of the Board and the brief and argument of counsel for the Board in the court below.

SUMMARY OF ARGUMENT

I

A. We submit a Board order directing an employer to withhold recognition from a union which has not filed documents specified in Section 9 (f) (g) and (h) "unless and until" that union "shall have been certified" is not a proper and lawful order. Two courts and two law review articles agree with our contention. The ratio decidendi of *United Mine Workers of America* v. *Arkansas Oak Flooring Co.*, 351 U.S. 62, leads to this conclusion.

We buttress our argument with four sufficient and necessary postulates, to wit:

(1) A Constitutional Act of Congress is the supreme law.

(2) It is the duty of courts and administrative boards to apply and enforce the public policy embodied in an Act of Congress.

(3) An order which deprives employees and unions of rights specifically protested by an Act of Congress and contravenes the public policy of the Act cannot stand.

(4) The right to nullify an Act of Congress cannot be acquired by prescription.

B. The first step is to go to the Act itself to ascertain the public policy of the United States. That policy is expressly declared in the last paragraph of Section 1 and reinforced by Section 7 which gives workers full freedom of designation and full freedom of choice of their representatives. By the definitions of "representatives" and "labor organizations" in Section 2

(4) and 2(5) respectively, the freedom is further extended.

C. Certification is not a condition precedent to representation and a Board election is not the only method by which majority status may be established. *Arkansas Oak Flooring Co.* case 351 U.S. 62 at 71-72.

D. Congress did not make filing under Section 9 (f), (g) and (h) compulsory nor a condition precedent to representation. It provided no penalties. The Act gives no punitive power to the Board nor does it give to the Board the power to compel filing under Section 9 (f), (g) and (h). The Board has remedial powers only under Section 10 (e) to effectuate the purposes of the Act. *N.L.R.B.* v. *Flotill Products, Inc.*, 180 F. (2d) 441 (C.A. 9); *N.L.R.B.* v. *Pennsylvania Greyhound Lines*, 303 U.S. 261, 267; *N.L.R.B.* v. *Gullett Gin Co.*, 340 U.S. 361 at 362.

E. The order of the Board must be adapted to the need of the individual case. *N.L.R.B.* v. *Pennsylvania Greyhound Lines*, 303 U.S. 261, at 268.

F. Although the Board and not the courts determine how the effect of unfair labor practices may be expunged, it does not have the power to require certification because certification does not expunge anything. Certification comes after a majority of employees have freely chosen their representative. A certification cannot work backwards in time. It cannot possibly have had any effect upon the minds of the workmen at the time they made their choice.

G. The use of the "unless and until certified" form of order grew up under the Wagner Act. That Act did not contain Section 9(f), (g) and (h). The enactment of that Section made filing of the financial

reports and affidavits conditions precedent to certification. Cases under the Wagner Act are beside the point. Even if the order had been used for twenty years under the present Act, the Board can acquire no prescriptive right to nullify or amend an Act of Congress.

H. The decision of the court below gives District 50 no preferred treatment. We do not ask for preferred treatment. We ask merely that the policy of the Act be followed, the remedy adapted to the situation and that neither the employees nor this union be deprived of rights expressly protected under the Act.

I. An order or device lawful under one set of circumstances becomes unlawful if it accomplishes an unlawful result. *Federal Trade Commission v. National Lead Company*, 352 U.S. 419; *Ethyl Gasoline Corp* v. *United States*, 309 U.S. 436.

II

J. In answer to the argument of Petitioner on Question Number 2, we submit court's order was not in excess of its authority and the court did not err in rewriting the order instead of remanding the case to the Board. This case arises under Section 10 (f). That Section granted the court below express power to "enter a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board". The decision of the Board on a question of law stands on a different basis before the United States Courts of Appeal from its decision on a question of fact. " * * * an order may not stand if the agency has misconceived the law. * * * ". *Securities & Exchange Commission v. Chenery Corp.*, 318 U.S. 80, at 94.

III

K. As to Question Number 3: The elimination from the notice of all references to the charging union seems to us to be a proper step forward in the complex and changing field of labor relations. Neither District 50's application nor its petition for review called for the taking of any further testimony before the Board, and we suggest that the language of Section 10 (e), "that no objection that has not been urged before the Board, its member, agent or agency shall be considered by the court" which does not appear in 10 (f) might well be held not to apply. Section 10 (e) applies to a party and Section 10 (f) to any aggrieved person.

ARGUMENT

Question Number 1

A. Question Number 1, the primary question in this case, is one of first impression in this Court. Both the court below and the United States Court of Appeals for the Fourth Circuit[2] agree in holding that an order of the Board directing an employer to withhold recognition from District 50 "unless and until the said labor organization shall have been certified as such representative by the Board" is not a proper order as to District 50, which has not filed the reports and affidavits specified in Section 9 (f) (g) and (h) of the Act.

Two law reviews have reviewed the decision of the court below (Harvard Law Review of May, 1957, Volume 70, No. 7 at page 1306 and the Minnesota Law Review of May, 1957, Volume 41 at page 825). Both Reviews likewise agree in holding that the order

[2] *District 50, United Mine Workers of America* v. *N.L.R.B.* and *Pittsburgh Valve Co., et al* v. *N.L.R.B.*, 234 F (2d) 565, 571.

was beyond the Board's authority. However, the note writers seem to think the court below should have remanded the case to the Board.

The decision of this Court in the case of *United Mine Workers of America* v. *Arkansas Oak Flooring Co.*, 351 U.S. 62, is the basic authority on which the court below relied. The opinion of this Court in that case is so clear and comprehensive that we might well rest our argument on Question Number 1 on that case alone. However, in view of the great mass of authorities cited by counsel for Petitioner, we desire to call to the Court's attention certain fundamental principles and some additional cases.

In the solution of any problem, whether legal or mathematical, it is well for those who exercise their reason to agree on the fundamental postulates or assumptions. The necessary postulates or assumptions in this case seem to us to be few in number. They are:

First. A Constitutional act of Congress which declares the public policy of the United States is the supreme law.

Second. It is the duty of the courts and the lesser administrative tribunals to apply and enforce the public policy embodied in an act of Congress.

Third. If an order of the National Labor Relations Board deprives employees and unions of rights specifically protected by the Act and contravenes the public policy of the Act, that order cannot stand.

Fourth. No administrative bureau can acquire by prescription the right to nullify an act of Congress.

B. The first step in our reasoning is to ascertain the public policy of the United States. Evidently, the

best place to find the meaning of an Act of Congress is in the Act itself. As expressed by Mr. Justice Reed in the case of *N.L.R.B.* v. *Dant*, 344 U.S. 375, "We hold that the sought-for congressional intent is found in the language of the Act; and as we have found it, the decision below must be reversed". (p. 385)

Mr. Chief Justice Stone, in *N.L.R.B.* v. *Pennsylvania Greyhound Lines*, 303 U.S. 261, clearly pointed out the direction in which the Court should look when passing upon a challenge to the order of the Board under the Wagner Act (hence, under the Labor Management Relations Act of 1947, as amended). His language is:

"Hence, upon the challenge of the affirmative part of an order of the Board, we look to the Act itself, read in the light of its history, to ascertain its policy, and to the facts which the Board has found, to see whether they afford a basis for its judgment that the action ordered is an appropriate means of carrying out that policy." (p. 265)

In studying the Act, it is well to remember that the principal Senatorial sponsor of the Act was an able lawyer and that experienced technicians in the field of labor relations assisted in drafting the Act.

Lest there be any doubt or ambiguity, the draftsmen gave an explicit definition of policy in the last paragraph of Section 1 (App. 30). That Section declares it to be the policy of the United States to eliminate the causes of obstructions to the free flow of commerce and to mitigate and eliminate those obstructions when they have occurred by "encouraging the practice and procedure of collective bargaining and by protecting the exercise by workers of full freedom of * * *

designation of representatives of their own choosing". That full freedom is not limited so far as we can find by any subsequent provision of the Act. On the contrary, Section 7 (App. 30-31) reaffirms the right of employees "to bargain collectively through representatives of their own choosing".

The full freedom of designation and choice of representatives is further extended by the express provision of Section 2 (4) (App. 30) that the "term 'representatives' includes any individual or labor organization".

The area of free choice is further extended by the express definition in Section 2 (5) (App. 30) which enacts that "'labor organization' means any organization of any kind, or any agency or employee representation committee or plan, in which employees participate * * *".

C. It seems clear beyond all doubt that representatives for the purposes of collective bargaining are not confined and limited to unions possessing a Labor Board certification. In *United Mine Workers of America* v. *Arkansas Oak Flooring Co.*, 351 U.S. 62 at p. 71, this Court said:

"Section 9 (a), which deals expressly with employee representation, says nothing as to how the employees' representative shall be chosen. See *Lebanon Steel Foundry* v. *Labor Board*, 76 U.S. App. D.C. 100, 103, 130 F. 2d 404, 407. It does not make it a condition that the representative shall have complied with Section 9 (f), (g) or (h), or shall be certified by the Board, or even be eligible for such certification."

Footnote number 8 to the opinion reads as follows:

"A Board election is not the only method by which an employer may satisfy itself as to the union's majority status. See, *e.g.*, *Labor Board* v. *Bradford Dyeing Assn.*, 310 U.S. 318, 338-339; *Labor Board* v. *Knickerbocker Plastic Co.*, 218 F. 2d 917, 921-922; *Labor Board* v. *Parma Water Lifter Co.*, 211 F. 2d 258, 261; *Labor Board* v. *Indianapolis Newspapers, Inc.*, 210 F. 2d 501, 503-504; *Labor Board* v. *Kobritz*, 193 F. 2d 8, 14; *Brookville Glove Co.*, 114 N.L.R.B. No. 52 (October 6, 1955), 36 L.R.R.M. 1548, 1549, n. 4."

Section 9 (f), (g) and (h).

D. The wording of Section 9 (f), (g) and (h) makes it clear that filing the reports and affidavits is not compulsory. Two United States Courts of Appeal touched upon this before this Court handed down its decision in the *Arkansas Oak Flooring Co.* case, 351 U.S. 62.

The United States Court of Appeals for the First Circuit has given a clear statement of the law in *National Labor Relations Board* v. *Reed & Prince Mfg. Co.*, 205 Fed. 2nd 131, 133-134. In that case, the respondent contended that it was under no statutory duty to bargain with a non-complying union. The Court says:

"The short answer is that Congress has not made compliance with the filing requirements of par. 9 (f), (g) and (h) a condition precedent to the obligation of an employer under par. 8 (a) (5) to bargain collectively with the chosen representative of the employees; such compliance is merely made a condition precedent to invoking the machinery of the Act for the investigation of a question concerning representation, or for

the issuance of a complaint charging the commission of unfair labor practices."

The United States Court of Appeals for the Second Circuit gave the same construction to the provisions of the Act in the case of *N.L.R.B.* v. *Pecheur Lozenge Co., Inc.*, 209 Fed. 2nd 393, 402, 2nd Cir. 1953. Their language is:

"In these circumstances, while failure to file the non-communist affidavits required by Section 9 (h) and financial statement and other reports required by Section 9 (f) and (g), bars a union from access to the processes of the Board, it does not necessarily destroy the Union's status as bargaining representative for purposes of Section 8 (a) 5. *West Texas Utilities Co.* v. *N.L.R.B.*, 87 U.S. App. D.C. 179, 184 F. 2nd 233, certiorari denied, 341 U.S. 939, 71 S. Ct. 999, 95 L. Ed. 1366; *N.L.R.B.* v. *Tennessee Egg Co.*, 6 Cir., 201 F. 2d 370, reversing 199 F. 2d 95 on the authority of *N.L.R.B.* v. *Dant*, 344 U.S. 375, 73 S. Ct. 375; *N.L.R.B.* v. *Reed and Prince Mfg. Co.*, 1 Cir., 205 F. 2d 131, 133. In the latter case, the Court held that 'Congress has not made compliance with the filing requirements of 9 (f), (g) and (h) a condition precedent to the obligation of an employer under 8 (a) (5) to bargain collectively with the chosen representative of the employees.' ".

In the *Arkansas Oak Flooring Co.*, case, 351 U.S. 62, at page 69, we find this language:

"The union's failure to file was not a confession of guilt of anything. It was merely a choice not to make public certain information. The Act prescribes no fine or penalty, in the ordinary sense, for failure to

file the specified data and affidavits. The Act does not even direct that they be filed."

and in the text of the opinion at page 73:

"Subsections (f), (g) and (h) of Section 9 merely describe advantages that may be gained by compliance with their conditions. The very specificity of the advantages to be gained and the express provision for the loss of these advantages imply that no consequences other than those so listed shall result from noncompliance."

The public policy of the Act being thus made clear by the Act and the interpretation of this Court, it became the duty of the Board to apply and enforce that public policy. In the celebrated case of *Standard Oil Co.* v. *United States*, 221 U.S. 1, this Court speaking through Chief Justice White made it clear that the Court (and, of course, lesser administrative boards) in arriving at a decision should follow the light of reason and be, "guided by the principles of law and the duty to apply and enforce the public policy embodied in the statute * * *".

The order complained of is compulsion by indirection. The Congress carefully refrained from making the filing compulsory. Evidently the sponsors of the Act did not dare to go that far. The Labor Board now through the device of an order valiantly seeks to do that which Congress would not do.

The Board order penalizes District 50 by depriving it of the right of election to file or not to file, afforded it by the Act.

It is submitted that the Labor Board has no punitive powers. Its powers are remedial only. See *N.L.R.B.* v. *Flotill Products, Inc.* 180 F. 2d 441 (C.A. 9).

In the language of Mr. Justice Roberts: "Section 10(c) was not intended to give the Board power of punishment or retribution for past wrongs or errors. Action under that Section must be limited to the effectuation of the policies of the Act.". *National Labor Relations Board* v. *Newport News Shipbuilding and Dry Dock Company*, 308 U.S. 241 (at 250).

Section 10 (c) of the Act confers remedial power upon the Board in these words:

"If upon the preponderance of the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action, including reinstatement of employees with or without back pay, as will effectuate the policies of this subchapter."

In the case of *N.L.R.B.* v. *Flotill Products, Inc.*, 180 F. 2d 441, the Circuit Court of Appeals of the Ninth Circuit considered a cease and desist order unless and until the union was certified. The Court set aside the Board's order in its entirety. We quote:

"As of the present no representation proceeding is either pending or in prospect. The Board insists, nevertheless, that the affirmative action it has directed the employer to take, namely, to cease giving effect to the exclusive bargaining and closed-shop relationship unless and until the union is certified, is such action as will effectuate the policy of the law. While it is the task of the Board, not of the Court, to determine matters of administrative policy, the court is obliged

to consider the effect of its own action in situations that appear to it to entail a proposed subversion, rather than an effectuation, of the legislative purpose. *It has many times been said that the fundamental purposes of the Act are to protect commerce from interruptions brought about by strike between employers and workers, and to stabilize labor relations by promoting the principle and practice of collective bargaining. Edison Co.* v. *N.L.R.B., supra; Colgate-Palmolive-Peet Co.* v. *N.L.R.B., supra.* As this case now stands, and has stood for the past two years, enforcement of the Board's order would in our considered judgment tend directly to thwart those purposes. The power granted the Board to direct affirmative action is remedial, not punitive; and the remedial effect of disciplining the employer would at this juncture be slight as compared with the harm certain to follow upon an enforced disruption of the legitimate and long-subsisting relationship between Flotill and this union." (Emphasis supplied) (p. 444)

Mr. Chief Justice Stone in *N.L.R.B.* v. *Pennsylvania Greyhound Lines*, 303 U.S. 261, used this language:

"To secure to employees the benefits of self-organization and collective bargaining through representatives of the employees' own choosing, the Board was authorized by section 10-(c), 29 U.S.C.A. Section 160 (c), to order the abandonment of unfair labor practices and to take affirmative action which would carry out the policy of the Act." (p. 267)

In the case of *N.L.R.B.* v. *Gullett Gin Co.*, 340 U.S. 361, at 362, Mr. Justice Minton used this language:

"To effectuate the policies of the Act, the Board has broad but not unlimited discretion. *Repub-*

lic Steel Corp. v. *Labor Board*, 311 U.S. 7, 11. 'The power to command affirmative action is remedial, not punitive.' Id., at 12. * * *."

The Board cannot impose sanctions not covered by the Act. See *Leedom* v. *International Union*, 352 U.S. 145, and *Meat Cutters* v. *Labor Board*, 352 U.S. 153.

E. The Order of the Board Was Not Adapted to the Need of the Individual Case.

In the *Pennsylvania Greyhound Lines* case, 303 U.S. 261, the learned Chief Justice quoted this part of the Report of the House Committee on Labor:

" 'The orders will of course be adapted to the need of the individual case; they may include such matters as refraining from collective bargaining with a minority group, recognition of the agency chosen by the majority for the purposes of collective bargaining, posting of appropriate bulletins, refraining from bargaining with an organization corrupted by unfair labor practices.' Report of the House Committee on Labor, supra, pp. 18, 24." (P. 268)

In *Williams Motor Company* v. *N.L.R.B.*, 128 F. (2d), 960, the United States Court of Appeals for the 8th Circuit, used this language:

"In its choice of remedies to effectuate the policies of the Act, a wide range is necessary because the remedy must fit the particular situation of each case." (p. 964)

In the same opinion, we find this language:

"The discretionary power of the Board is to select any remedy which reasonably is adapted to effectuate the policies of the Act and fitted to the particular situation being dealt with by it." (p. 965)

In the case of *National Labor Relations Board* v. *Bradford Dyeing Association*, 310 U.S. 318, Mr. Justice Black, speaking for the Court, said:

"If the Board has acted within the compass of the power given it by Congress, has, on a charge of unfair labor practice, held a 'hearing', which the statute requires, comporting with the standards of fairness inherent in procedural due process, has made findings based upon substantial evidence and has ordered an appropriate remedy, a like obedience to the statutory law on the part of the Court of Appeals requires the court to grant enforcement of the Board's order." (p. 342)

In *N.L.R.B.* v. *Mackay Radio & Telegraph Co.*, 304 U.S. 333, at 348, Mr. Justice Roberts used this language:

"As we have held in *National Labor Relations Board* v. *Pennsylvania Greyhound Lines*, 303 U.S. 261, the relief which the statute empowers the Board to grant is to be adapted to the situation which calls for redress. * * *"

The ruling is expressed in different language by Mr. Justice Stone, writing for the Court in *N.L.R.B.* v. *Express Publishing Co.*, 312 U.S. 426, at 436 in this wise:

"The breadth of the order, like the injunction of a court, must depend upon the circumstances of each case."

Mr. Justice Frankfurter, writing for the Court in *N.L.R.B.* v. *Seven-up Bottling Co. of Miami, Inc.*, 344 U.S. 344, uses different words of caution:

"* * * It seems more profitable to stick closely to the direction of the Act by considering what order does, as this does, and what order does not, bear appropriate relation to the policies of the Act. Cf. *Labor Board* v. *Gullett Gin Co.*, 340 U.S. 361. * * *"

* * * * * * * * * *

"This is not to say that the Board may apply a remedy it has worked out on the basis of its experience, without regard to circumstances which may make its application to a particular situation oppressive and therefore not calculated to effectuate a policy of the Act. * * *" (p. 349)

F. The primary question in this case has never been decided by this Court. A decision holding that the order of the Board was inappropriate would not be inconsistent with the prior decisions of this Court nor require their modification. The ruling we invoke is consistent with the ruling in *I. A. of M.* v. *Labor Board*, 311 U.S. 72 in which it is said:

"Where as a result of unfair labor practices a union cannot be said to represent an uncoerced majority, the Board has *the power to take appropriate steps to the end that the effect of those practices will be dissipated.* That necessarily involves an exercise of discretion on the part of the Board—discretion involving an expert judgment as to ways and means of protecting the freedom of choice guaranteed to the employees by the Act. It is for the Board, not the courts, to determine how the effect of prior unfair labor practices *may be expunged. National Labor Relations Board* v. *Pennsylvania Greyhound Lines*, 303 U.S. 261; 271; *National Labor Relations Board* v. *Faulk Corp.*, 308 U.S. 453, 461. * * *". (p. 82) (Emphasis supplied)

The importance of the quoted language is magnified by this Court in the case of *Franks Bros. Co.* v. *N.L.R.B.*, 321 U.S. 702 in which, at page 704, we find:

"* * * One of the chief responsibilities of the Board is to direct such action as will dissipate the unwholesome effects of violations of the Act. See 29 U.S.C., Sec. 160 (a) and (c). And, 'It is for the Board, not the courts, to determine how the effect of prior unfair labor practices may be expunged.' *International Association of Machinists* v. *Labor Board*, 311 U.S. 72, 82."

To expunge or dissipate means to wipe out or erase from the minds of the employees the effect of the unfair labor practice. The unfair labor practice was conduct on the part of the employer. The order of the Board directing the employer to take affirmative, corrective steps was followed by the order of the court, but the requirement "unless and until the representative shall have been certified as such by the Board" bearing no relation to the act of expunging the effects of the unfair labor practice from the minds of the employees was properly modified. Those employees were in Birmingham, Gadsden, and Anniston, Alabama; Atlanta, Georgia; Chattanooga and Memphis, Tennessee and Richmond, Virginia. Certification by the Board in Washington would necessarily come after the employees had exercised their freedom of choice. Under the terms of the Act, it could not come before. In the very nature of things, human conduct has effect in the future. Its effect cannot go backward in time. It is only in fantastic science fiction that men can go back in time.

There is no possible way in which a certificate by the Board, subsequent to the untrammelled exercise by the employees of their freedom of choice, could influence that freedom of choice.

G. The Fact That the Board Had Used the Form of Order for Twenty Years Does Not Make the Order Valid or Appropriate.

The use of the "unless and until" certified form of order grew up under the Wagner Act. That Act did not deny the processes of the Board to any labor organization. That Act did not contain anything resembling Section 9 (f) (g) and (h) of the Labor Management Relations Act of 1947, as amended. The cases under the old Act are beside the point.

In continuing the use of the same order after the passage of the Labor Management Relations Act of 1947, as amended, the Board did not take into account the realities of the situation. Under the old Wagner Act, prior to the amendments, neither the employees nor the union selected by them were adversely affected. Under the new Act, such an order adversely affects the union. It amounts to a denial to the employees of the full freedom of choice of their bargaining agent and denies to the chosen labor union the right to represent such employees.

Even if the order had been used for twenty years instead of ten, under the present Act, the Board can acquire no prescriptive right to nullify or amend an Act of Congress. A wrongful or unlawful practice does not become right and lawful merely because of

the passage of time. Whenever this Court, upon re-examination and reconsideration, has concluded that the doctrine of a decision is wrong, it has not hesitated to announce what it conceived to be the correct doctrine. Witness the decision in *Erie Railroad Co.* v. *Tompkins*, 304 U.S. 64 and its effect on the doctrine of the old case of *Swift* v. *Tyson*, 16 Pet. 1 and how decades of practice under the viewpoint of *Plessy* v. *Ferguson*, 163 U.S. 537 , were abrogated by the decision of *Brown* v. *Board of Education of Topeka*, 347 U.S. 483.

The Constitutional separation of powers prevents the Board from nullifying or amending an Act of Congress. In the case of *Colgate-Palmolive-Peet Co.* v. *N.L.R.B.*, 338 U.S. 355, this language is found:

"It is not necessary for us to justify the policy of Congress. It is enough that we find it in the statute. That policy cannot be defeated by the Board's policy, which would make an unfair labor practice out of that which is authorized by the Act. The Board cannot ignore the plain provisions of a valid contract made in accordance with the letter and the spirit of the statute and reform it to conform to the Board's idea of correct policy. *To sustain the Board's contention would be to permit the Board under the guise of administration to put limitations in the statute not placed there by Congress.*" (Emphasis supplied) (p. 363)

II. The Order of the Court Below Does Not Give District 50 Preferred Treatment.

We submit that the order of the court below does not give District 50 preferred treatment over unions that filed. It simply gives District 50 proper treatment.

The order of the court is adapted "to the factual situation which calls for redress". *N.L.R.B.* v. *Mackay Radio & Telegraph Co.*, 304 U.S. 333, at 348.

Under the provisions of Section 10 (c), Congress conferred upon the Board the attribute of flexibility. Instead of exercising that attribute, the Board would now apply a rigid rule regardless of the factual situation.

It is easy to see why the unions which elected to file the reports and affidavits specified in Section 9 (f) (g) and (h) have never attacked in this Court the stereotyped form of order in question. They were not hurt. Having already elected to file, such an order did not affect their right to decide for themselves whether they would or would not file.

The fact that they did not contest it does not mean that a requirement of certification is a means of "expunging" or "dissipating" the effect of an unfair labor practice.

District 50 contests the order because it deprives it of a right given it by Congress and deprives those who favor it of the right given to them by Congress freely to choose their representative for purposes of collective bargaining.

One of the first objectives of legal education is to learn to detect differences in factual situations. Courts are constantly engaged in pointing out to lower courts and busy lawyers differences that they have overlooked. We say the situation of District 50 is different from that of the unions which elected to file. Out of different sets of facts, different laws arise.

I. The Fact That an Order or Device May be Lawful Under One Set of Circumstances Does Not Prevent It From Becoming Unlawful Under a Different Set of Circumstances

We read the words of the Great Chief Justice in *McCullough* v. *Maryland*, 4 Wheaton 316 at 421:

"Let the end be legitimate, let it be within the scope of the Constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consistent with the letter and spirit of the Constitution, are Constitutional."

We believe that if he had had a different case before him, he might well have written:

"Let the end result be unlawful, let it contravene the public policy of the United States embodied in a Constitutional statute, let that end result deprive citizens of rights guaranteed to them and protected by a Constitutional Act of Congress, then whatever means or device, however lawful in appearance it may be, that is used to accomplish that unlawful result is prohibited and unlawful."

In our own less powerful tones, we would say: "There is no lawful means by which an unlawful result may be achieved". This is not strange doctrine. In the case of *Federal Trade Commission* v. *National Lead Company*, 352 U.S. 419 at 430, we find this statement:

"Although the plan might be used for some lawful purposes, decrees often suppress a lawful device when it is used to carry out an unlawful purpose."

The opinion then cites *Ethyl Gasoline Corporation* v. *United States*, 309 U.S. 436, in which, at 461, Mr. Justice Stone writes:

"Since the unlawful control over the jobbers was established and maintained by resort to the licensing device, the decree rightly suppressed it even though it had been or might continue to be used for some lawful purposes."

We submit that the rule should be the same whether the one fashioning the device or using the contrivance is actuated by wrongful motives or high purpose. It matters not whether the Board used the order for the purpose of compelling District 50 to file under Section 9 (f) (g) and (h) or whether it used the device under the mistaken belief that it was the appropriate form of order to use.

Question Number 2

J. This question as stated by Petitioner is: "Whether, assuming that the Board's order was in excess of its authority, the court of appeals erred in rewriting the order instead of remanding the case to the Board."

Section 10 (f) of the Act granted to the court below express power to "enter a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part, the order of the Board".

We have found but one limitation in Section 10 (f) on the court's power to modify or set aside. It is this: "The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall in like manner be conclusive." Section 10 (e) and (f).

The courts have drawn a distinction between an administrative determination on questions of fact and its decision on a question of law. "* * * an order may

not stand if the agency has misconceived the law. * * * " *Securities & Exchange Commission* v. *Chenery Corp.*, 318 U.S. 80, at 94. The decision and order of the court below corrects a misconception of law.

The United States courts of appeal are not conducting a course in advanced composition. Litigation would be indefinitely prolonged if the court had to remand, the Board rewrite, the litigant take a second appeal, the court remand again, the Board try its hand at composition again and the litigant again petition for review.

The court below has done in one step what could easily require two or more steps and two or more appeals if the case were remanded to the Board. Stability in labor relations would not be achieved by such procedures.

The United States Court of Appeal for the Fourth Circuit in a closely similar case remanded the case to the Board because of a question of fact. The language, in *District 50, United Mine Workers of America* v. *N.L.R.B.* and *Pittsburgh Valve Co., et al.* v. *N.L.R.B.*, 234 F. (2d) 565, 571, is:

"We think the Board should have gone into this question and found the facts with regard thereto."

The opinion closed with these words:

"For the reasons stated, the order under review will be set aside and the case will be remanded to the Board for further proceedings not inconsistent herewith."

The Board showed no desire to frame an order not inconsistent with the opinion of Chief Judge Parker. The Board did nothing in that case for about seven months and then avoided framing a proper order by

petitioning that court for leave to dismiss the entire proceedings. See *District 50, United Mine Workers of America* v. *N.L.R.B.* and *Pittsburgh Valve Co., et al.* v. *N.L.R.B.*, 242 F. (2d) 837.

While the courts must be careful not to slide over into areas reserved for administrative decision, they should be equally careful not to slide out of the picture. Congress was very careful to give no District Court power to correct a Labor Board decision. That exclusive jurisdiction was given to the United States Courts of Appeal. Those courts by their reasoning upon legal principles and correction of Board decisions on questions of law can relieve this Court of a great burden.

The National Labor Relations Board in twenty years has placed in its reports approximately one-half as many words as this Court has placed in its reports since the Court first began to sit.

About July 5, 1957, "there were 108 decisions of the Supreme Court of the United States which reviewed N.L.R.B. decisions". Remarks of Honorable Joseph A. Jenkins, Member, National Labor Relations Board before the Labor Law Section of the Texas State Bar Association Convention, Fort Worth, Texas, July 5, 1957, p. 25.

Questions as to the power of the United States Courts of Appeal under the statute do not require as much pinpointing by this Court as do questions in the shadowy zone between state jurisdiction and exclusive Federal jurisdiction.

The frequency with which the Board has changed its views on practically all subjects enhances the importance of judicial review by the United States Courts

of Appeal. The remarks of Hon. Joseph J. Jenkins with reference to the division of the Board on "hot cargo" clauses and conduct pursuant thereto, in the speech above referred to, to wit: "With each change in the membership of the Board a different view has emerged.", might be given a general application.

Question Number 3

K. The two Circuit Judges constituting the majority of the panel in the court below sat on the panel of the court which decided the *Acrovox Corporation* v. *N.L.R.B.*, 211 F. (2d) 640, which refused to eliminate reference to certain labor organizations by name. In that case, however, Judge Wilbur K. Miller dissented. Evidently, Judge Prettyman upon further reflection and further experience in deciding cases in the field of labor relations came to the conclusion that the policy of the Act would best be served by eliminating such reference. It seems to us indisputable that references to the charging union in the Board's form of notice are susceptible of being construed as indicating that the Board preferred Teamsters. The elimination from the notice of all references to the charging union seems to us to be a proper step forward in the complex and changing field of labor relations.

Section 10 (c) deals with parties. A party is present before the Board and has the opportunity to present evidence. Such objections as the party makes at the hearing or before the Board serve to give the Board an opportunity to make further investigation of the factual situation. District 50 was not a party in the original hearing (R. 52).

Does not elimination come within the power of a court to adapt the relief granted by its order to the situation confronting the court?

CONCLUSION

For the reasons stated, the judgment below should be affirmed.

Respectfully submitted,

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APPENDIX

The relevant provisions of the Labor Management Relations Act of 1947, as amended (61 Stat. 136, 65 Stat. 601, 29 U.S.C. 141, *et seq.*) are as follows:

Section 1. Findings and Declaration of Policy (last paragraph)

It is declared to be the policy of the United States to eliminate the causes of certain substantial obstructions to the free flow of commerce and to mitigate and eliminate these obstructions when they have occurred by encouraging the practice and procedure of collective bargaining and by protecting the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection. 61 Stat. 136, 29 U.S.C. 151.

Section 2. Definitions

(4) The term "representatives" includes any individual or labor organization.

(5) The term "labor organization" means any organization of any kind, or any agency or employee representation committee or plan, in which employees participate and which exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work. 61 Stat. 137, 29 U.S.C. 152 (4) (5).

Section 7. Right of Employees as to Organization, Collective Bargaining, Etc.

Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the pur-

pose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 158 (a) (3) of this title. 61 Stat. 140, 29 U.S.C. 157.

Section 8. Unfair Labor Practices

(a) It shall be an unfair labor practice for an employer—

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 157 of this title;

(2) to dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it; * * *.

* * * * * *

(5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 159 (a) of this title. 61 Stat. 140, 65 Stat. 601, 29 U.S.C. 158.

Section 9 (a), (f), (g) and (h)

(a) Exclusive representatives; employees' adjustment of grievances directly with employer.

Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment; * * *

* * * * * *

(f) No investigation shall be made by the Board of any question affecting commerce concerning the representation of employees, raised by a labor organization under subsection (c) of this section, and no complaint shall be issued pursuant to a charge made by a labor organization under subsection (b), of section 160 of this title, unless such labor organization and any national or international labor organization of which such labor organization is an affiliate or constituent unit (A) shall have prior thereto filed with the Secretary of Labor copies of its constitution and bylaws and a report, in such form as the Secretary may prescribe, showing—

(1) the name of such labor organization and the address of its principal place of business;

(2) the names, titles, and compensation and allowances of its three principal officers and of any of its other officers or agents whose aggregate compensation and allowances for the preceding year exceeded $5,000, and the amount of the compensation and allowances paid to each such officer or agent during such year;

(3) the manner in which the officers and agents referred to in clause (2) of this subsection were elected, appointed, or otherwise selected;

(4) the initiation fee or fees which new members are required to pay on becoming members of such labor organization;

(5) the regular dues or fees which members are required to pay in order to remain members in good standing of such labor organization;

(6) a detailed statement of, or reference to provisions of its constitution and bylaws showing the procedure followed with respect to, (a) qualification for or restrictions on membership, (b) election of officers and stewards, (c) calling of regular and special meetings, (d) levying of assessments, (e) imposition of fines, (f) authorization for

bargaining demands, (g) ratification of contract terms, (h) authorization for strikes, (i) authorization for disbursement of union funds, (j) audit of union financial transactions, (k) participation in insurance or other benefit plans, and (l) expulsion of members and the grounds therefor;

and (B) can show that prior thereto it has—

(1) filed with the Secretary of Labor, in such form as the Secretary may prescribe, a report showing all of (a) its receipts of any kind and the sources of such receipts, (b) its total assets and liabilities as of the end of its last fiscal year, (c) the disbursements made by it during such fiscal year, including the purposes for which made; and

(2) furnished to all of the members of such labor organization copies of the financial report required by paragraph (1) of this subdivision to be filed with the Secretary of Labor.

Annual reports by union; contents

(g) It shall be the obligation of all labor organizations to file annually with the Secretary of Labor, in such form as the Secretary of Labor may prescribe, reports bringing up to date the information required to be supplied in the initial filing by subsection (f) (A) of this section, and to file with the Secretary of Labor and furnish to its members annually financial reports in the form and manner prescribed in subsection (f) (B) of this section. No labor organization shall be eligible for certification under this section as the representative of any employees, and no complaint shall issue under section 160 of this title with respect to a charge filed by a labor organization unless it can show that it and any national or international labor organization of which it is an affiliate or constituent unit has complied with its obligation under this subsection.

Affidavits showing union's officers free from Communist Party affiliation or belief

(h) No investigation shall be made by the Board of any question affecting commerce concerning the representation of employees, raised by a labor organization under subsection (c) of this section, and no complaint shall be issued pursuant to a charge made by a labor organization under subsection (b) of section 160 of this title, unless there is on file with the Board an affidavit executed contemporaneously or within the preceding twelve-month period by each officer of such labor organization and the officers of any national or international labor organization of which it is an affiliate or constituent unit that he is not a member of the Communist Party or affiliated with such party, and that he does not believe in; and is not a member of or supports any organization that believes in or teaches, the overthrow of the United States Government by force or by any illegal or unconstitutional methods. The provisions of section 35A of the Criminal Code shall be applicable in respect to such affidavits. '61 Stat. 143, 65 Stat. 601, 29 U.S.C. 159.

Section 10. Prevention of Unfair Labor Practices—
(a) Powers of Board generally

(a) The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in section 158 of this title) affecting commerce. * * *

* * * * * * *

(c) * * * If upon the preponderance of the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take

such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of this subchapter: * * * *And provided further*, That in determining whether a complaint shall issue alleging a violation of subsection (a) (1) or (a) (2) of section 158 of this title, and in deciding such cases, the same regulations and rules of decision shall apply irrespective of whether or not the labor organization affected is affiliated with a labor organization national or international in scope. * * *

* * * * * *

(d) Until a transcript of the record in a case shall have been filed in a court, as hereinafter provided, the Board may at any time, upon reasonable notice and in such manner as it shall deem proper, modify or set aside, in whole or in part, any finding or order made or issued by it.

(e) The Board shall have power to petition any United States Court of Appeals (including the United States Court of Appeals for the District of Columbia), or if all the United States courts of appeals to which application may be made are in vacation, any United States district court, within any circuit or district, respectively, wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order and for appropriate temporary relief or restraining order, and shall certify and file in the court a transcript of the entire record in the proceedings, including the pleadings and testimony upon which such order was entered and the findings and order of the Board. Upon such filing, the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter upon the pleadings, testimony, and proceedings set forth in such transcript a decree

enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board. No objection that has not been urged before the Board, its member, agent, or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive. * * *

* * * * * * *

(f) Any person aggrieved by a final order of the Board granting or denying in whole or in part the relief sought may obtain a review of such order in any United States court of appeals in the circuit wherein the unfair labor practice in question was alleged to have been engaged in or wherein such person resides or transacts business, or in the United States Court of Appeals for the District of Columbia, by filing in such a court a written petition praying that the order of the Board be modified or set aside. A copy of such petition shall be forthwith served upon the Board, and thereupon the aggrieved party shall file in the court a transcript of the entire record in the proceeding, certified by the Board, including the pleading and testimony upon which the order complained of was entered, and the findings and order of the Board. Upon such filing, the court shall proceed in the same manner as in the case of an application by the Board under subsection (e) of this section, and shall have the same exclusive jurisdiction to grant to the Board such temporary relief or restraining order as it deems just and proper, and in like manner to make and enter a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board; the findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall in like manner be conclusive. 61 Stat. 146, 62 Stat. 991, 63 Stat. 107; 29 U.S.C. 160.